IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No. 1215 of 2007
Date of decision 15.3 .2007

Shashi Pal Mehra .. petitioner

Versus

Union of India and another .. Respondents

CORAM: HON'BLE MR. JUSTICE M.M. KUMAR
HON'BLE MR. JUSTICE RAJESH BINDAL

PRESENT: Mr. SK Mukhi, Advocate for the petitioner

M.M.Kumar, J.

This petition filed under Article 226 of the Constitution is directed against the order dated 13.9.2005 passed by the Commissioner of Income Tax II Amritsar in respect of the assessment year 1998-99 denying the petitioner the waiver of penalty imposed under Section 271(1)(c) of the Income Tax Act,1961 (for brevity 'the Act') which has been sought by him under Section 273(A) of the Act.

Brief facts of the case may first be noticed.

There is an assessee with the name of Shashi Pal Mehra who claims to be a successful businessman and partner in many concerns with turn of over crores. He also claims that his father who was associated with various social and welfare activities and also associated as a financial controller of various charitable trusts, died on 24.9.2002 and he alongwith his brother Mr. Ravinder Pal Mehra inherited and divided amongst themselves various items of gold jewellery and cash. Both of them declared those items to the Income Tax department under the Voluntary Disclosure Income Scheme of 1997 (for brevity 'the VDIS 1997'). He filed his income tax return under Section 139(1) of the Act for the assessment year 1998-99

on 31.3.1999 (Annexure P.3) in which he declared his income at Rs.4,21,440/-. The return was processed under Section 143(1)(a) of the Act. No revised return within the stipulated period of one year, which expired on 31.3.2000, was filed. Alongwith return, copies of bank accounts, statements and several other documents were attached indicating that the petitioner-assessee had disclosed on 31.12.1997 in VDIS 1997 jewellery and cash valued at Rs. 21,53,810/-. In the disclosure statement made by the assessee it was stated to be concealed income pertaining to the various assessment years 1977-78, 1985-86, 1986-87 and 1992-93 to 1996 -97. The cash components out of income disclosed under VDIS amounting to Rs.9,50,000/- was deposited in assessee's bank account. The assessee petitioner had also attached copy of account as partner in the firm M/s A.G.Exports from which cash receipts were shown at Rs. 16,98,000/- and share profit was shown at Rs. 3,37,941/- which was claimed as exempt. The assessee- petitioner has claimed that an amount of Rs. 35,00,000/- was found in the almiraha of his deceased father who spent last days of his life at Haridwar. On the advice given by the Chartered Account Shri Vivek Kapur, he had invested the afore-mentioned amount in the firm M/s A.G. Exports instead of voluntarily declaring the same in VDIS 1997. On account of some search and seizure made at Yamunanagar on 12.10.2001 by the Income Tax Department against Shri Mohan Lal Arya and Sons Group a number of copies of several partnership deeds and final accounts of some firms based at Amritsar were seized. On the legal advice of their consultants various businessmen settled at Amritsar approached the Settlement Commission. The petitioner also consulted his Chartered Accountant Shri Vivek Kapur who asked him to surrender his income and accordingly

revised return was filed on 27.3.2002 by including the additional income of Rs. 17,50,000/- as share of profit from fictitious partnership firm M/s A.G. Exports. On 3.4.2002 a notice dated 3.4.2002 under Section 148 of the Act (Annexure P.8) was issued to the petitioner. The petitioner in nut-shell claimed that filing of revised return on 27.3.2002 was a voluntary act on his part whereas the department in the impugned order claimed that the revised return could have been filed on or before 31.3.2002 before the period of one year expired. It has been emphasised in the impugned order that the assessee petitioner had come to know about the 'Bogus Export Entry Scam' master-minded by Shri Vivek Kapur, CA. and M/s A.G. Exports was a fictitious firm used by the asseessee- petitioner. Knowledge of the exposition of the Scam led to the filing of revised return by the petitioners on 27.3.2002. On the filing of revised return, a notice under Section 148 of the Act was issued to the assessee- petitioner on 3.4.2002 (Annexure P/8). Another notice was issued for penalty proceedings under Section 271(1)(c) of the Act. The assessing officer levied penalty of Rs.5,29,900/- (Annexure P.9). The appeal before the Commissioner of Income Tax (A) in quantum proceedings was dismissed vide order dated 4.3.2005, which order was further upheld by the Income Tax Appellate Tribunal.

It is appropriate to mentioned that against the levy of penalty under Section 271(1)(c) of the Act, the petitioner filed a waiver petition under Section 273(A) of the Act (Annexure P.11). The petitioner claimed that he fulfilled all the requisite conditions. The amount of waiver being more than rupees five lacs it was required to be approved by the Chief Commissioner of Income Tax and the matter was sent to the Chief Commissioner of Income Tax for his approval with the recommendation

made by the Commissioner of Income Tax (Annexure P.2). The approval has been denied by the Chief Commissioner of Income Tax by the impugned order dated 13.9.2005 (Annexure P.1).

The short issue raised, in the facts and circumstances of this case, is as to whether whether the Chief Commissioner of Income Tax is bound to grant waiver of penalty once a recommendation has been made by the Commissioner of Income Tax.

Mr. S.K. Mukhi, learned counsel for the petitioner has argued that the Chief Commissioner of Income Tax should have granted permission to the Commissioner of Income Tax for waiver of penalty as the assessee petitioner fulfilled all the necessary conditions contemplated by Section 273A of the Act. According to the learned counsel, the revised return was filed on 27.3.2002 whereas notice under Section 148 of the Act was issued/ served on 3.4.2002 which is later than the voluntary act of disclosure of income by the petitioner. He has maintained that the petitioner had voluntarily and in good faith had made true and full disclosure of all the particulars of his income. In support of his submission, learned counsel has placed reliance on a Division Bench judgement of this Court in the case of Shanti Sarup Sharma v. CIT (1999) 237 ITR 376 and a judgement of Andhra Pradesh High Court in the case of Kakarala Krishnamurthy v. CIT (1996)85 Taxman 41. He has also placed reliance on a judgement of the Bombay High Court in the case of B.R.Sound -N- Music v. O.P. Bhardwaj and others (1988) 173 ITR 433 and argued that under Section 273(A) of the Act the remedy is independent which is not affected in any way by the right of appeal and or revision which has been provided by other provisions of the Act and could be exercised by the Commissioner assuming that penalty

and interest have been rightly levied. He also submitted that Section 273A of the Act does only apply to a voluntary disclosure of concealed income. According to the learned counsel when a return is filed the assessee disclosed his income in such return and he should be assumed to have filed the return voluntarily and in good faith when no notice under Sections 139 (2) or Section 148 of the Act has been issued. He has also placed reliance on a Single Bench judgement of the Madras High Court in the case of M.K.Radhakrishan v. CIT and another (2000) 244 ITR 347.

We have carefully considered the submissions made by the learned counsel and find that the facts in the present case do not leave any manner of doubt that the impugned order dated 13.9.2005 passed by the Commissioner of Income Tax does not suffer from any legal infirmity warranting exercise of jurisdiction by this Court under Article 226 of the Constitution. It would be appropriate to refer Section 273A of the Act, which reads as under:

" Section 273 A:

(1)Notwithstanding anything contained in this Act, the Commissioner may, in his discretion whether on his own motion or otherwise.-

(i)

(ii) reduce or waiver the amount of penalty imposed or imposable on a person under clause (iii) of sub section (1) of Section 271; (or)

iii) if he is satisfied that such person-

(a) xx xx xx xx

(b) in the case referred to in clause (ii) has prior to the

detection by the (Assessing) Officer, of the concealment of particulars of income or of the inaccuracy of particulars furnish in respect of such income, voluntarily and in good faith, made full true disclosure of such particulars,

b) and also has (in the case referred to in clause (b), co-operated in any enquiry relating to the assessment of his income and has either paid or made satisfactory arrangements for the payment of any tax or interest payable in consequence of an order passed under this Act in respect of the relevant assessment year.

Explanation: For the purposes of this sub section, a person shall be deemed to have made full and true disclosure of his income or of the particulars relating thereto in any case where the excess of income assessed over the income returned is of such a nature as not to attract the provisions of clause © of sub section of (1) of Section 271.

(2) Notwithstanding anything contained in sub section (1).-

(a) xx xx xx xx xx

(b) If in case falling under clause © of sub section (1) of Section 271, the amount of income in respect of which the penalty is imposed or imposable for the relevant assessment year, or, where such disclosure relates to more than one assessment year, the aggregate amount of such income for those years, exceeds a sum of five hundred thousand rupees,

no order reducing or waiving the penalty under sub section (1) shall be made by (The Commissioner except with the previous approval of the Chief Commissioner or Director General, as the case may be)

(3) and (4) xx xx xx

(5) Every order made under this Section shall be final and shall not be called into question by any court or any other authority."

The afore-mentioned provision shows that the Commissioner of Income Tax has been clothed with a discretion to reduce or waive the amount of penalty imposed or imposable by the provision under Clause (iii) of sub section 1 of Section 271 of the Act if he is satisfied that prior to the detection by the assessing officer of concealment of particulars of income or of the inaccuracy of the particulars mentioned in respect of such income the assessee had voluntarily and in good faith, made full true disclosure of such statement. It further requires that the assessee has cooperated in any enquiry relating to the assessment of his income and had either paid or made satisfactory arrangement for the payment of tax or interest etc. In cases where the aggregate amount of such income exceeds a sum of Rs. Five lacs then prior approval of the Chief Commissioner or Director General is necessary.

A perusal of the impugned order dated 13.9.2005 shows that the matter was referred to the Chief Commissioner as required by Section 273A(2) of the Act and the Chief Commissioner after detailed discussion and affording an opportunity to the assessee- petitioner had not approved the proposal of the Commissioner for waiver of penalty as he found that the

various conditions envisaged by Section 273A of the Act were not fulfilled because the disclosure could not be treated as voluntary. The order of the Chief Commissioner dated 2.9.2005 is self speaking. The same, as quoted in the impugned order, is reproduced hereunder:

> " 2..... the matter was examined in detail and an opportunity of being heard was also allowed to the assessee. After examining the relevant factual and legal position and after considering the submissions made by the assessee, it has been concluded that the disclosure made by the assessee was not voluntary and, therefore, the assessee is not eligible for getting the benefit of waiver of penalty u/s 273A. This conclusion has been arrived at on the basis of following factual and legal position:
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> 2.1The return of income in this case was filed on 31.3.1999 declaring an income of Rs. 4,21,440/- only. This return was processed u/s 143(1)(a). The time for filing the revised return expired on 31.3.2000 and assessee did not file any revised return till that date. Copies of bank accounts, statements and several other documents were attached alongwith this Return indicating that this petitioner assessee had disclosed on 31.12.1997 under the VDIS 1997 jewellery and cash valued at Rs. 21,53,810/-. In the disclosure statement, this was stated to be the concealed income pertaining to assessment years 1977-78, 1985-86, 1986-87 and 1992-93 to 1996-97. The cash component out of income disclosed under VDIS amounting to Rs. 9,50,000/- was deposited in assessee's bank account. Alongwith this return

the petitioner had also attached a copy of account as partner in the firm M/s A.G. Exports from which cash receipts were shown at Rs. 16,98,000/- and share profit was shown at Rs. 3,37,941/- which was claimed as exempt. It is this cash of Rs. 1698,0-00/- plus commission of Rs. 52,000/- paid to Shri Vivek Kapoor, CA who arranged the accommodation entries by raising Bogus Export Entry Scheme, which has attracted penalty u/s 271(1)(c), the waiver of which has been sought through the petition under reference.

2.2 The VDIS was operative during the period July, 1997 to December, 1997 and actually the assessee during this period was in possession of cash/ jewellery representing concealed income amounting to more than Rs./ 39,00,000/- but the assessee disclosed only cash and jewellery valued at Rs. 21,53,810/- under VDIS and laundered the balance cash amounting to Rs. 17.5 lacs representing concealed income by making use of Bogus Export Entry Scam which was masterminded by his financial advisor -cum- CA Shri Vivek Kapoor. Apparently, the petitioner assessee did not wish to pay even 30% of tax on his entire undisclosed income under VDIS and therefore paid an amount of Rs. 6,46,143/- only under VDIS by disclosing an amount of Rs. 21,53,810/-. However, balance amount of Rs. 17.5 lacs was brought into the books of accounts as receipts from M/s A.G. Exports which was a bogus export entity created under the partnership deed forged by Shri Vivek Kapoor and cash was

routed through bank account no. 1338 in State Bank of Patiala, East Mohan Nagar, Amritsar which was opened and operated by Shri Vivek Kapoor in the name of fictitious persons. Thus, cash amounting to Rs.17.5 lacs was laundered without paying any tax either under the Income Tax Act or under the VDIS. For the next 4 years the petitioner felt secure and happy under the belief that the Income Tax Department has not been able to know about the Bogus Export Entry Scam and has thus not succeeded in detecting the concealment of income by the petitioner.

2.3 Search and seizure operations were conducted by the Investigation Wing of the Income Tax Department on 19.10.2001, which brought to light “Bogus Entry Scam”. Shri Vivek Kapoor, CA was at the epi-centre of this Scam for providing accommodation entries to various assessees.The modus operandi was to show such assesses as partners in exporting concerns by writing bogus/ forged partnership deeds. Sh. Vivek Kapoor also opened several bank accounts by using fake names. He would deposit cash representing concealed income of the assessees in these bank accounts and then issue cheques from such bank accounts and entire income of this bogus/ forged partnership entity on paper would be stated as exempt representing export profit and share of the partner would be claimed as exempt u/s 10(2A) of Income Tax Act, 1961.

2.4 As per assesee's own admission, Sh. Vivek Kapoor was a

CA-cum- Financial Advisor for him and he was also running this racket of Bogus Export Entry Scam. Thus, the assessee had knowingly and willingly, opted to become a partner in the forged entity by the name of M/s A.G. Exports and utilized this Bogus Export Entry scam to launder his unaccounted money through bank account no. 1338 in the State Bank of Patiala, East Mohan Nagar, Amritsar opened and operated by Sh. Vivek Kapoor in fictitious names. As per conspiracy hatched in consultation with Sh. Vivek Kapoor, the assessee passed on Rs. 17,50,000/- in cash representing concealed income and got cheques/ drafts issued worth Rs. 16,98,000/- from this bank account and balance amount of Rs. 52,000/- was paid to Sh. Vivek Kapoor as his commission for providing such accommodation entries to the assessee. This entire information had come into the possession of the department on account of search and seizure operations carried out on 19.10.2001 and post search enquires made.

2.5 After gathering sufficient evidence to develop a foolproof case of Bogus Export Entry scam statements of various persons involved in the scam were also recorded by the officers of the department. The statement of Shri Vivek Kapoor was recorded on 15.1.2002, 18.1.2002 and again on 19.1.2002. The relevant extracts from these statements have been reproduced in the assessment order by the Assessing Officer and need not be repeated here. Through these

statements, Shri Vivek Kapoor categorically admitted that he was running this Bogus Export Entry scam. He also admitted that he was the CA for M/s A.G. Exports, Amritsar and that he misused the name of this concern for providing accommodation entries to various persons, including the petitioner. Since Shri Vivek Kapoor was the Financial Advisor cum CA of the petitioner he would naturally have learned about the detection of the scam by the department on /before 19.1.2002. Yet revised return disclosing this concealed income of Rs. 17,50,000/- was not filed by the assessee on 20.1.2002 or immediately thereafter.

2.6 On 8.2.2002 the DDI (Inv.) recorded the statement of Sh. Avtar Singh, who was the genuine partner of the actual firm named M/s A.G. Exports. From this statement it became clear that the actual firm had only 5 partners and Shri Vivek Kapoor, being the CA, had in his possession the partnership deed of the firm. However, Shri Vivek Kapoor forged another partnership deed in the name of M/s A.G. Exports and added in this forged partnership deed 6 more names as partners including the name of the petitioner. Shri Avtar Singh, the genuine partner, categorically stated that this partnership deed showing eleven partners was forged by some one and even the signatures of Sh. Avtar Singh were forged. Sh. Vivek Kapoor opened and operated several bank accounts in fictitious names and he also opened a bank account no., 1338 in State Bank of Patiala, EMN Amritsar

on the basis of this forged partnership deed in the name of M/s A.G.Exports. The cash amounts received from various beneficiaries of the Bogus Export Entry scam including the receipts from the petitioner, were routed through/ deposited in these bank accounts opened and operated in fictitious names by Sh. Vivek Kapoor. As admitted by the petitioner himself, a total of 17,50,000/- was given by him in cash to Shri Vivek Kapoor and in turn 4 cheques/ demand drafts of Rs. 16,98,000/- issued from the above stated bank account no. 1338 were received by the petitioner and balance amount of Rs. 52,000/- was paid to Sh. Vivek Kapoor as his fee for arranging these accommodation entries for the petitioner.

2.7 The Investigation Wing of the Income Tax Department compiled the report on this Bogus Export Entry Scam and submitted the same to the Commissioners of Income Tax concerned on 20.3.2002. Clear and categorical details pertaining to Bogus Export Entry Scam run by CAs of Yamunanagar and Amritsar by forging partnership deeds in the names of existing export firms, manipulating/ forging balance sheets and opening and operating bank accounts in fictitious names and enable laundering of concealed income by charging commission were given in this report by the Investigation wing. The method and the manner in which this amount of Rs. 16,98,000/- (Rs.1750000-52000) was brought into the books of account as receipts from bogus entity M/s A.G.Exports was also fully explained in this

report, which was duly received by the CIT II Amritsar on 20.3.2002 clearly stating therein that Account no. 1338 of M/s A.G.Exports in State Bank of Patiala, East Mohan Nagar, Amritsar, was opened and operated by Shri Vivek Kapoor and the petitioner was one of the beneficiaries of this scam.

2.8 Since, the report from the Investigation Wing was received by the Assessing Officers on 21/22.3.2002, notices u/s 148 in most of the cases were issued by the Assessing Officers in the last week of March and many such notices were served by 27th March, 2002. Amritsar, being a small town, most of the beneficiaries of the Bogus Export Entry Scam had got panicked fearing adverse action by the department and the petitioner was also one such beneficiaries. Under these circumstances and against this background, the petitioner assessee submitted a revised return on 27.3.2002 surrendering therein this additional income of Rs. 17,50,000/-. The time limit for filing a revised return had expired on 31.3.2000. Such a revised return was not valid in the eyes of law. (This return was filed in the Range I office and apparently was seen by the Assessing Officer i.e. ACIT Circle IV after several weeks). Based on the report received from the Investigation wing the Assessing Officer had recorded the detailed reasons on 2.4.2002 for reopening the case of this petitioner and notice u/s 148 was served on 3.4.2002. In response to this notice, the assessee stated that

the revised return filed on 27.3.2002 may be treated as filed in response to notice u/s 148.

2.9 In view of the above facts , it is clear that the judgement of the Allahabad High Court in the case of Dhan Raj v. CIT Kanpur (140 ITR 652) on which reliance has been placed by the CIT II Amritsar is not really relevant to the facts of the case. Actually subsequent judgement of full bench of Hon'ble Allahabad High Court in the case of Bhairav Lal Verma v. UOI (230 ITR 855) is squarely applicable to the facts of this case. In this case, the Hon'ble Full Bench of Allahabad High Court had held as under:

> : Our answer to the questions referred is as under:
>
> (i) The word “voluntarily” in Section 273A of the Act means out of free will without any compulsion. Voluntary disclosure of income means the disclosure of income out of free will without any compulsion/constraint.
>
> (ii) As a principle of law it cannot be held that the disclosure of the concealed income after the raid or search cannot be voluntary. It is a question, which has to be decided by the Department in each case on the basis of the material available on the record. The criteria for deciding this question is to find out as to whether the Department has any incriminating material with regard to the disclosed income. If the answer is in the affirmative, the disclosure cannot be

said to be voluntary. But if the Department has no incriminating material with regard to the income disclosed, the disclosure is liable to be treated as voluntary even if it was made after raid/ search."

Clearly in this case, the department had already received/ collected incriminating material with regard to the income so disclosed subsequently by the petitioner and disclosure cannot be said to be voluntary because it was made under the constraint of exposure to adverse action by the department. Infact, the circumstances are even worse in the case of this petition because his own Financial Advisor cum CA had made a confession in 3rd week of January, 2002 that he was running the Bogus Export Entry Scam and that he had also forged a partnership Deed in the name of M/s AG Exports and had opened and operated Bank account No. 1338 in the State Bank of Patiala, EMN Amritsar by giving fictitious name. He had also admitted that accommodation entries for laundering undisclosed income were given to the beneficiaries and the petitioner was one such beneficiary. Even then the petitioner did not suffer the undisclosed income till the department had actually started issuing and serving notices under Section 148 on the persons involved in the scam. Therefore, the disclosure made by the assessee could not be considered as voluntary.

2.10. Further, your attention is invited to sub section (7A) of Section 2 as per which ADIT/DDIT/ IDIT of the

Investigation Wing are included in the definci8tion the word "Assessing Officer". Therefore, detection by the DDIT (Inv) CII T (lav.) is also to be considered as detection by the Assessing Officer. Reference is also made to another judgement of Allahabad High Court in the case of Moolchand Ramesh Kumar (115 ITR 1) in which it was held that "Even a case where the Assessing Officer started investigation by laying open what was concealed or hidden or what continued to elude observation, would also be covered in the case of detection within the meaning of that word".

3. In view of the facts stated above, your proposal seeking approval of the undersigned for waiving the penalty u/s 271 (1)(c) in this case is not approved. Infact, it is not a fit case for waiving the penalty, as conditions prescribed u/s 273A are not fulfilled as the disclosure in this case cannot be treated as voluntary. Before issuing these instructions, the principles laid down by the Hon'ble Allahabad High Court in their judgement in the case of Hindustan Scientific Glass and Fancy Glass works Vs. CIT (229 ITR 522) have been complied with as an opportunity of being heard was allowed to the petitioner and submissions made have duly been considered and taken into account. It will not be out of place to mention that CIT(A) vide his orders dated 4.3.2005, while deciding the appeal against this penalty u/s 271(1)(c) of which waiver has been sought, has confirmed the penalty

and has also held that the disclosure made by the assessee was not voluntary. Your attention in this regard is invited to Board's instruction no. 1871 dated 10.12.1990 as per which the administrative Commissioner should immediately communicate to the office of CCIT about the pendency of appeal before CIT(A) against the same penalty of which waiver is sought u/s 273 A.

3.1 In view of the factual and legal position stated supra, your proposal for waiver of penalty in this case is not approved....."

The afore-mentioned order is self speaking and does not call for further comments. Moreover, the assessee petitioner has invoked the extra ordinary equitable jurisdiction of this Court which cannot be exercised in his favour because it is well known maxim that whosoever seeks equity is also expected to do equity.

The argument of the learned counsel based on various judgements do not call for any detailed examination because a Division Bench judgement of this Court in Shanti Sarup's case (supra) is entirely different as in that case relief was granted to the assessee- petitioner because the assessee- petitioner was granted enhanced compensation in lieu of acquisition of his land which he could not have anticipated. The judgements of other Courts relied by the petitioner are entirely different on facts and circumstances. We are further of the view that merely because the Commissioner had recommended the case of the assessee- petitioner with the observation that he had fulfilled all the requirements of Section 273A of

the Act, the Chief Commissioner was not bound to accept his proposal for waiving the penalty imposed/ imposable under Section 271(1)(c) of the Act therefore, there is no merit in this petition. Accordingly, the writ petition fails and the same is dismissed.

(M.M.Kumar)
Judge

(Rajesh Bindal)
Judge

15.3.2007
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